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In the Supreme Court of the United States

OCTOBER TERM, 1954

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, NEW YORK DISTRICT, DEPARTMENT OF JUSTICE,
PETITIONER

v.

UNITED STATES EX REL. JOSEPH ACCARDI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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[redacted]
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OPINIONS BELOW

The opinion, concurring opinion, and dissenting opinion in the Court of Appeals (R. 197-215) have not yet been reported. The findings and conclusions of the District Court appear at pages 188-190 of the record.

The prior opinion of this Court in this cause is reported at 347 U.S. 260.

JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 1955 (R. 215-216). The petition for a writ of certiorari was filed on February 24, 1955, and was granted on March 14, 1955 (R. 216). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon the unchallenged testimony of members of the Board of Immigration Appeals that they understood that the inclusion of aliens in the Attorney General's program for deporting undesirable aliens meant only that the Board was to give priority to such cases, the court below properly applied this Court's decision in *Accardi* v. *Shaughnessy*, 347 U.S. 260, in presuming that the mere existence of such a program prevented the Board from exercising its independent discretion on respondent's application for suspension of deportation.

STATUTES AND REGULATIONS INVOLVED

Section 19(c) of the Immigration Act of 1917 and implementing regulations 8 C.F.R. (1951 Supp.) 150.7, 150.9 and 151.3 are set forth in the Appendix, *infra*, pp. 51-54.

STATEMENT

In its prior opinion in this cause, *Accardi* v. *Shaughnessy*, 347 U.S. 260, this Court ruled that the allegation, in the petition for habeas corpus seeking review of an order of deportation, that the denial of respondent's application for suspension

of deportation by the Board of Immigration Appeals had been caused by the prejudgment of his case by the Attorney General, raised an issue of fact which required a hearing. The Court pointed out that it was charged in the petition that the Attorney General had previously and publicly described respondent as an undesirable alien and that "proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, 'We can't do a thing in your case because the Attorney General has his [respondent's] name on that list of a hundred' " (347 U.S. at 267). After noting that the petition for habeas corpus charged the Attorney General with dictating the decision of the Board, and that the offer was to prove such fact, 347 U.S. at 267, the Court said, at page 268:

> It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. * * * Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations [emphasis in original].
>
> If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list * * *, which is nothing more than what the regulations accord petitioner as a right. Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the

Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings.

Following the decision by this Court, the District Court issued a writ of habeas corpus on May 10, 1954 (R. 8-9). After the filing of a return to the writ, supplemented by affidavits, a traverse, interrogatories, and responses thereto (R. 10-55), District Judge McGohey held a hearing on June 23, 1954 (R. 84), at which relator attempted to prove his allegations. The Chairman of the Board of Immigration Appeals testified at the hearing (R. 84-133), and this oral testimony was supplemented by depositions of former Attorney General McGranery (R. 134-145), members of the Board (R. 56-72), and Michael J. Horan, a Special Assistant to the Attorney General (R. 73-83). The evidence adduced may be summarized as follows:

The record before the Board disclosed that respondent had entered the United States without a visa in 1932 (R. 177-178). His deportability is not contested. He was convicted of conspiracy to defraud the United States over a period between 1934 and 1937 (R. 178). His record also showed arrests in 1933 (as a disorderly person) and in 1934 (one arrest for possession of lottery slips, and another for violation of liquor laws), and several indictments by a federal grand jury for violation of the internal revenue laws, the latest being in 1940 (R. 179, 183).

Proceedings to deport respondent were instituted in 1947 and hearings were begun in 1948 (R. 178). Thereafter, on April 23, 1949, respondent married a legally resident alien; a child was born to them in the United States on October 8, 1951 (R. 173, 179). Respondent's wife testified that she was completely dependent upon respondent for support (R. 173). Respondent also claimed that since 1941 or 1942 he had supported his father (R. 173). At the hearing before the Immigration and Naturalization Service hearing officer, evidence disclosed that respondent's father had conveyed to a daughter-in-law assets of $50,700 during the years 1943 and 1944 (R. 173). Moreover, respondent failed to bring forward requested data as to his finances (R. 175). He presented four witnesses who testified, upon varying degrees of acquaintance, to his good repute (R. 173-175).

The hearing officer, on May 15, 1952, recommended against grant of the discretionary suspension of deportation (R. 176). On July 7, 1952, the Acting Assistant Commissioner of Immigration, upon consideration of the record and the hearing officer's report, and adverting *inter alia* to the doubtful aspect of "unexplained sources of income," held (R. 180):

> In view of all the circumstances regarding [respondent's] sources of income, his assets, and his manner of earning a living, together with his previous arrest record and his conviction record, it is indicated that relief from deportation is not justified in this case * * *.

On April 3, 1953, the Board of Immigration Appeals concurred in the denial of the application for discretionary relief (R. 181-184).

After the rulings of the hearing officer and the Assistant Commissioner, while respondent's appeal to the Board of Immigration Appeals was pending, the then Attorney General instituted a program for the vigorous prosecution of deportation proceedings against aliens believed to be "engaged in racketeering and other criminal activities" (R. 137). Respondent was included within the program on November 19 or 20, 1952 (R. 54, 74, 79, 82). According to the evidence before the District Judge, the origin and nature of the program were as follows:

Attorney General McGranery held a conference with F. B. I. Director Hoover in which he asked for the names of racketeers and undesirables who had obtained their citizenship through fraud or were subject to deportation. Thereafter, he called a meeting of officials of the Department of Justice, and Thomas J. Donegan was placed in charge of coordinating the investigation and preparation of charges in these deportation matters (R. 138-139). Recommendations for adding names to the Attorney General's deportation program could come from the Immigration and Naturalization Service, the F. B. I., the Criminal Division, or the Deputy Attorney General's Office (R. 75). These units were represented on the Coordinating Committee, of which Donegan was chairman and Michael J. Horan the assistant (R. 76).

Mr. McGranery stated in his deposition that his program was for the purpose of "deporting and ridding the nation of undesirable aliens engaged in racketeering and other criminal activities" (R. 136-137). There was no static list of potential deportees, but the list was constantly changing from day to day as the records were studied (R. 135-136). Respondent was included within the program when an F.B.I. report and the Attorney General's own investigation indicated that respondent was a racketeer.

The existence of the program was disclosed in a press release of October 2, 1952 (R. 148-149). It referred to the "final goal" of restoring the dignity of citizenship; the necessity to "thwart the criminal activities" of "naturalized racketeers" by means of "a series of individual petitions to the District Courts to revoke naturalization"; and "appropriate" action for deportation to be taken against "unsavory characters." Thereafter, when proceedings were instituted against various aliens within the program, announcement of this fact would be made to the press (see R. 166-167).

The former Attorney General testified that he never sent out a list of individuals within the program (R. 142) nor did he ever indicate to the Board "either directly or indirectly [his] feelings as to how they should determine a case" (R. 142). The Board was only to expedite the cases (R. 144).

Horan likewise testified that priority was to be given program cases (R. 75), but at no time did

he, or anyone else to his knowledge, suggest to the Board how a case should be decided (R. 83).

Thomas G. Finucane, Chairman of the Board of Immigration Appeals at the time respondent's case was before it, testified in person before the District Court. His testimony was as follows:

He first became aware of the Attorney General's program, as announced in the official press release of the Department of Justice on October 2, 1952 (R. 148-149), by reading of it in the newspapers and then receiving a copy of the press release (R. 103-104). He probably circulated this press release among the other Board members as the normal practice, although he had no specific recollection on this (R. 104-105). Finucane did not understand the program to be one for intensifying efforts looking toward deportation and denaturalization of subversives and racketeers, but rather to intensify efforts in the prosecution of such cases (R. 111). Neither Donegan nor Horan of the Department of Justice ever called Finucane regarding the program (R. 111-112).

About two or three months after the announcement, Mr. Rawitz of the Immigration Service asked whether the Board could expedite the consideration of cases under the program. Finucane stated that the Board would do so. (R. 107.) The procedure adopted was for Rawitz to give the Board's calendar clerk a written memorandum showing a case to be within the program, but in some instances oral communications may have been employed (R. 109-110).

There was, however, no written communication to the Board to expedite the hearing of respondent's case, and Finucane recalled no oral request for this (R. 109-110, 126-127). He also stated that the Board members did not receive any instructions from the Attorney General or any of his subordinates as to how respondent's case should be decided on its merits (R. 126).

Finucane testified that when respondent's case was decided, no press release or order of the Attorney General was before the Board members or discussed by them, and that their decision was "free and undictated" (R. 113-114). No member of the Board or its staff had anything to do with the preparation of the Department of Justice press release on April 3, 1953, announcing the Board's decision (R. 114-115, 149-150).

The depositions of the members of the Board attested the same understanding of the total contact and responsibility of the Board with respect to the program, not only as it affected respondent's case but in every program case (R. 68-69). However, the members other than the Chairman were not familiar with the mechanics of notice to the Board concerning program cases. Two had no knowledge of the existence of the practice and none knew when the practice had been begun (R. 63). All four stated that they never received any communications from anyone in government indicating that a case should be decided adversely to the alien, nor did they understand any press release or announcement, or any notification that

an alien was within the program, as being an indirect intimation, suggestion, or hint to that effect (R. 71-72).

With respect to any knowledge, at the time of the decision, that respondent was within the program, one of the members definitely testified that he did not have that knowledge, and none of the three other members could definitely testify that they recalled such knowledge.[1]

The Board members unanimously testified that, even if they had known that respondent's name was included in the program, this would not have influenced their decision on the merits and they would not have construed this as dictation by the Attorney General for an adverse decision (R. 72).

No proof was offered in support of respondent's earlier contention, noted by this Court (*supra*, p. 3), that the Commissioner of Immigration had told his attorney that "We can't do a thing in your case because the Attorney General has his [respondent's] name on that list of a hundred."

The District Court, in dismissing the writ of

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[1] "A. (Mr. Charles) On the date of the rendition of that decision, I had no personal knowledge that such was the situation.

"A. (Mr. Nettleton) I have no knowledge at this time whether I knew or not. I may have known, but I couldn't say.

"A. (Mr. Ludwig) I can't say with definiteness, but it is my opinion that on April 3rd at the time the decision was rendered, I knew that Accardi was on the list.

"A. (Mrs. Wilson) I have no recollection that I knew he was on the list, whether or not he was on the list." [R. 69.]

The Chairman believed, from earlier talks with all four, that they had not been aware of the inclusion (R. 110, 128).

habeas corpus, held that relator had failed to prove his charge (R. 187-190), making the following pertinent findings:—that in the fall of 1952 the then Attorney General inaugurated and publicly announced a program to deport aliens believed to be engaged in organized crime (R. 188-189); that the Board of Immigration Appeals was not one of the agencies represented in the coordinating group established to effectuate the program (R. 189); that the Chairman of the Board was notified either orally or in writing that a specific alien was embraced in the program, the notification being "sometimes passed on to other Board members, sometimes not" (R. 189); that "[t]he purpose of the notification, and it was so understood by the Board, was merely to indicate that the Attorney General desired expeditious consideration and determination of the appeal" (R. 189); that "[n]either such notification nor the existence of the program was considered by the Chairman or by any Board member as a direction by the Attorney General, or even as a hint by him, to decide an appeal adversely to an alien. Moreover, that these matters were given no weight by the Board in their deliberations" (R. 189); that "[i]n accordance with the practice in such cases, notice was given to the Board that [respondent] was an alien embraced within the Attorney General's program" (R. 189); that—

> 6. The Attorney General never discussed his program with the Chairman or any Board

member. There is no evidence, nor is it claimed, that he ever discussed [respondent's] or any other case with any of them.

7. The Board members and each of them who considered [respondent's] appeal reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or anyone else acting or purporting to act for him.

8. The Board's adverse decision on [respondent's] appeal is adequately supported by the evidence before the Board.

The District Court further stated (R. 190):

This Court has had the advantage of seeing and hearing the Board's Chairman on the stand and accepts completely his testimony which was neither shaken nor controverted. The testimony of the other witnesses was introduced through their depositions, all of which have been carefully read. It is significant that none of this testimony is in any respect contradicted or shaken. [Respondent's] position here reduces to the mere suggestion that the Court should disbelieve the witnesses' denials and accept the inferences relator draws from the existence of the Attorney General's program and the practice of notification. I find no rational basis for disbelieving the witnesses, and relator's inferences are clearly

refuted by the testimony which is fully accepted.

On appeal, the judgment was reversed and remanded by the Court of Appeals for the Second Circuit, Judge Harlan dissenting (R. 197-216). Judge Frank of the majority read this Court's prior opinion as holding that respondent was entitled to a new hearing if he could prove that he was one of the persons to whom the Attorney General's statements and press releases referred, that a majority of the Board knew that fact, and that they were affected by it when they denied him discretionary relief (R. 200). Judge Frank accepted as a fact that the Board members consciously believed, when they testified, that the Attorney General's statements amounted to no more than a direction to give priority to a case on the program, but he found it impossible to believe that, in determining respondent's application for discretionary relief, they were not unconsciously influenced by knowledge that his name was included in the program (R. 201-204). Accordingly, he ruled that respondent was entitled to be discharged unless accorded a new hearing before the Board under the new instructions issued by the present Attorney General on April 23, 1954, after this Court's prior decision in the case.[2] Judge Clark, concurring,

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[2] These instructions declared in part (R. 18):

> * * * [N]either the selection nor the identification of cases believed to be within the scope of this program is any responsibility of those exercising adjudicatory func-

was of the view that it was unnecessary to speculate about the effect of the Board's knowledge of the program on the exercise of its discretion; that the prior opinion of this Court merely required respondent to prove, as he had, that there was a program, that respondent was included within it, and that such fact was known to the Board. He concluded that such facts "create a presumption of bias not overcome by the Board's self-serving declaration to the contrary. This would be so, whether the program was one of expedition or one of deportation, for in either case [respondent] was being singled out as an alien whose imminent departure was deemed desirable by the Attorney General." He also expressed doubt as to whether the Attorney General's instructions of April 1954 constituted a withdrawal of the list. (R. 214.) Judge Harlan, dissenting, was of the opinion that this Court had held that the issue on remand was "whether the Board's denial of discretionary relief represented its own untrammelled decision or one dictated by the Attorney General"; that the trial judge's finding that the board mem-

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tions in deportation proceedings. Effectuation of the program has been and continues to be, the responsibility of those charged with prosecuting duties. Accordingly, it is not intended that there be any departure from the regulations in the hearing and decision of any individual case, whether or not it is thought to fall within the policy of deporting criminal or subversive aliens.. Those charged with the duty of hearing and deciding must give each alien a fair and impartial trial, without prejudgment on the basis of assertions by any official having the function of prosecuting these cas s.

bers reached their decision "free from any dictation or suggestion by the Attorney General" or anyone acting for him was not clearly erroneous; and hence that the order of the District Court should be sustained (R. 215).

SUMMARY OF ARGUMENT

I

A year ago this Court held that respondent was entitled to a hearing on his allegation that, in considering his plea for executive clemency through suspension of deportation, the Board of Immigration Appeals had failed *"to exercise* its own discretion, contrary to existing valid regulations." *Accardi* v. *Shaughnessy*, 347 U. S. 260, 268. The existence of the Attorney General's deportation program and respondent's inclusion under it were acknowledged in the record and in the government's presentation at that time. *Id.* at 264-265. Had these facts been sufficient to require a new hearing before the Board of Immigration Appeals, there would have been no occasion for the remand to the District Court.

Accordingly, we agree with Judge Frank (R. 200) that respondent was required to establish in the District Court that

> (1) he was one of the persons to whom the Attorney General thus referred, and
>
> (2) a majority of the Board knew that fact, and

(3) the majority was affected by it when the Board denied him discretionary relief.

We also agree that the third of these assertions presents the critical issue. And we urge that the court below erred in disregarding all the testimony in the record and rejecting the District Court's finding that respondent had failed to prove this decisive allegation.

II

Whether the Board members failed to exercise their discretion is, as Judge Frank observed (R. 201), a question of fact. The evidence amply sustained the District Court's finding that the Board had in fact reached an independent judgment. Generalizations about "human nature" do not justify rejection of the finding.

A. The Chairman of the Board testified personally, the other members by deposition. All swore that they regarded the Attorney General's program as concerning exclusively the Department's prosecutors and as affecting adjudications only to the extent of requiring expedition in the hearing of cases under the program. They had never had any suggestion from anyone that the existence of the program was to influence their decision in any case. They had decided this case, like others, on its own merits.

Former Attorney General McGranery, who instituted the program, testified to the same effect. Press releases and statements by the Department of Justice likewise reflected that while "program"

cases were to be prosecuted with vigor, there was no purpose to eliminate or circumvent the process of independent decision by officers of the Department responsible for adjudications.

The Board's decision in this case on its face supports the testimony that the Board exercised the independent judgment required by the regulations. Respondent made out a wholly unconvincing case for clemency. The hearing officer and Acting Assistant Commissioner had denied it before inauguration of the Attorney General's program. Respondent's criminal record, his claim of an apparently affluent father as a dependent for tax purposes, and the obscurity (which he was invited but failed to clarify) as to his sources of substantial assets justified these decisions, with which the Board subsequently agreed, that he did not merit suspension of deportation. True, the Board referred to character witnesses and investigation revealing that respondent was "considered" a person of good moral character (R. 183-184). But this recognition that there were factors to be weighed on both sides, far from supporting the claim of "prejudgment," helps to demonstrate that the Board was exercising its own discretion in deciding the merits of respondent's application. Other cases under the program, in some of which there have been determinations favorable to the alien, point to the same conclusion.

The District Court found from the evidence that the Attorney General had not influenced the Board, that the members of the Board had stated the true

facts when they said that their decision had been reached "on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or any one else acting or purporting to act for him" (R. 190). There was no basis in the record for rejecting these decisive findings as "clearly erroneous."

B. The members of the Board of Immigration Appeals have each held their posts for many years. Seasoned in the duty of judging serious matters, their sworn testimony that they judged fairly and independently in this case as in others carries assurance that they understood fully what such testimony meant. Moreover, their long experience in following the regulations requiring exercise of their independent judgment fortifies the usual presumption that they behaved properly in this case.

Against the testimony of the Board members, the presumption of regularity, and the findings of the District Court, Judge Frank invokes generalizations concerning "human nature" to show that the Board must "unconsciously" have been influenced by the Attorney General to abdicate the discretion it is required by the Attorney General's regulations to exercise. Such speculation cannot justify holding "clearly erroneous" the District Court's contrary finding from the evidence in this case.

Subordinates in government and business are frequently called upon to make independent determinations on matters concerning which their superiors have stated preliminary judgments. Judges must decide suits against high executives

who exercise power over appointments to higher benches. Hearing officers and agencies themselves must decide cases where the determination to prosecute has been made by the agency. It has never been supposed that some "unconscious" pressure toward prejudgment vitiates the process of decision in such cases. To the contrary, this Court has rejected claims that an initial judgment to prosecute, or even a general statement on the merits of a problem, disables a tribunal from deciding fairly. *Fahey* v. *Mallonee*, 332 U. S. 245, 256; *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 700-703. Similarly, the Court has refused to impute constructive bias to juries drawn from government employees (*Dennis* v. *United States*, 339 U. S. 162), and has rejected inquiry into the mental processes leading to a decision fair on its face (*United States* v. *Morgan*, 313 U. S. 409, 421-422). Here, where all the testimony affirms that the Board exercised the judgment called for by the regulations, psychological generalities of the type invoked by Judge Frank do not warrant a conclusion, opposed to that of the trier of facts, that this could not have been so.

We do not deny, of course, that there is basis in experience for Judge Frank's view that some people would be influenced in exercising discretion by the supposed will of their superior. But there is strong basis also for the belief—erected by the law into a presumption—that responsible people do their duty, tell the whole truth, and exercise their discretion when they are supposed to. Like

every trier of facts, the District Judge—who saw, questioned, and believed the Board Chairman as well as having the opportunity to read the depositions—must be supposed to have brought to his deliberations the wisdom which encompasses all such generalizations. His findings reveal the care with which he considered the matter. His conclusion that the testimony stated the facts should have been sustained.

ARGUMENT

As the Court noted when this case was here a year ago (347 U. S. at 261-262), there has never been any question in these proceedings, begun in 1947, that respondent is a deportable alien, having entered the United States illegally. The single issue has been whether his application for relief by suspension of deportation—a kind of executive clemency allowable solely in the discretion of the Attorney General, and requiring the approval of Congress in each instance—was heard in accordance with "that due process required by the regulations [of the Attorney General] in such proceedings." *Id.* at 268. This issue, as it is now posed by the decision below, turns on whether the District Judge, the trier of the facts, could reasonably believe the uncontroverted testimony of the members of the Board of Immigration Appeals that they had followed the regulations, from which they had never been authorized to depart. Holding to the contrary, the majority below rejected the findings of the District Court as "clearly erroneous." They

held, in effect, that the "board's alleged *failure to exercise* its own discretion" (347 U. S. at 268, emphasis in original)—which, under this Court's decision, respondent was required to prove on the remand—must be presumed to have been established from the facts that (1) respondent was one of a group of aliens to whom the Attorney General had referred as specially undesirable and against whom deportation proceedings were to be prosecuted with special expedition, and (2) the Board of Immigration Appeals knew this.

We believe, with Judge (now Mr. Justice) Harlan, who dissented, that the majority below has misconstrued the decision of this Court. The record of the judicial hearing respondent was granted by order of this Court establishes convincingly that the Board heard fully and fairly his application for suspension. It shows that he was denied the discretionary clemency he sought, not because of any "presumed" or "unconscious" bias of the Board, but because in the free exercise of its own judgment the Board concluded that his dubious biography did not warrant this relief reserved for deportable aliens who can affirmatively establish the desirability of their presence here. At the least, we submit, the findings of the District Court to this effect could not properly be rejected on appeal as "clearly erroneous."

I

This Court's Prior Decision, Remanding for a Hearing by the District Court, Did Not Hold That the Existence of the Attorney General's Program, Which Was Acknowledged Then, Was in Itself Sufficient to Prove the Allegation of Prejudgment

Recognizing that the controversy in this case relates to a plea for executive clemency, available only in the discretion of the Attorney General (which, when favorably exercised, must be approved by Congress), this Court expressly refrained from "reviewing and reversing the *manner* in which discretion was exercised." *Accardi* v. *Shaughnessy*, 347 U. S. 260, 268. Instead, the Court confined its objection narrowly and precisely "to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations." *Ibid.* And in the sentence immediately following, the problem to be resolved on the remand was stated in terms of this objection (*ibid.*): "If petitioner can prove the allegation [namely, "the Board's alleged *failure to exercise* its own discretion"], he should receive a new hearing before the Board without the burden of previous proscription by the list."[3]

As the Court noted (347 U. S. at 264-265), the existence of the Attorney General's program, and the inclusion of Accardi's name under it, had already been acknowledged in the District Court.

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[3] Compare the quotation from this portion of the opinion, overlooking the passage which has seemed critical to us, in the opinion of Judge Frank (R. 198).

The Government's brief in this Court specifically referred to, and nowhere denied, the existence of this program (Brief for the Respondent, Oct. Term, 1953, No. 366, pp. 17, 26-27, 29, 31, 32, 35, 37, 47). Accardi's name was plainly on the program. If these facts were enough to require a new hearing before the Board of Immigration Appeals, there was no occasion to remand for the taking of evidence in the District Court. But the case was remanded, and obviously not merely for *pro forma* proof of the program which the Government had freely acknowledged. For this Court envisaged that respondent "may be unable to prove his allegation before the District Court" (347 U. S. at 268), an impossible assumption if formal proof of the program would be sufficient. It is true that the record on the prior appeal did not show explicitly that the Board knew that Accardi's was a "program" case, but the probability that notice of this had reached the Board lay close to the surface. If this was all that had to be established on the remand, it surely would have been simply said. Instead, the Court remanded for trial of a more complex issue of fact—whether the Board had *in fact* been guilty of a *"failure to exercise* its own discretion, contrary to existing valid regulations." 347 U. S. at 268.

The issue had been so formulated by the petition for habeas corpus. It was alleged, not merely that there was a list and that respondent was on it, but "that because of the listing * * * and because of consideration of matters outside the record of his

immigration hearing, discretionary relief [had] been denied"; that "it [had] been impossible for [Accardi] to secure fair consideration of his case" (R. 4, 5). There was even a significant offer of proof, which Judge Frank had relied upon in his dissent (206 F. 2d 897, 903) and which this Court included in its statement of the factors deemed to render the petition for habeas corpus sufficient to require a hearing. The Court observed (347 U. S. at 267) that

> proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, "We can't do a thing in your case because the Attorney General has his [petitioner's] name on that list of a hundred."

At the ensuing hearing this Court ordered, there was no attempt to make good on this damaging offer of proof. As we show in detail below (pp. 27-36), far from substantiating the assertion that respondent's case was not fairly heard by the Board, the hearing produced only uncontradicted testimony to the contrary. Here, preliminarily, we emphasize our view—contrary to that of Judge Clark—that this Court's earlier decision does not justify the result reached by the majority below in the face of such evidence.

We note, too, that our appraisal of this Court's mandate is substantially the same as that stated by Judge Frank.[4] He concluded (R. 200) that this

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[4] Judge Harlan's opinion also interprets the prior *Accardi* decision in the same way as we do. On this issue, therefore, the majority of the court below agrees with the Government.

Court meant to grant respondent a new hearing before the Board of Immigration Appeals if he could prove that

> (1) he was one of the persons to whom the Attorney General thus referred, and
>
> (2) a majority of the Board knew that fact, and
>
> (3) the majority was affected by it when the Board denied him discretionary relief.

Judge Frank found that there was an "issue of fact" only as to the third proposition: "Was a majority of the Board members influenced by that knowledge?" (R. 201.) On this decisive issue, the District Court found against respondent. Judge Clark, relying on an erroneous reading of this Court's opinion, found that it was not a separate issue at all under the mandate—that influence on the Board must be conclusively presumed from proof "that there was a list as alleged, that [respondent] was on it, and that this fact was known to the Board" (R. 214). Judge Frank, despite his differing statement of the issues, reached a substantially similar conclusion, though he explained it on "factual" generalizations concerning "human nature" and "unconscious" influences.

On the correct statement of the issue, the problem here is plain enough. It is whether there is justification for reversing as "clearly erroneous" the District Court's finding—"supported by the sworn and unequivocal testimony of the Board members who sat on Accardi's case" (Judge Har-

lan, dissenting (R. 215)—that the Board members "reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or anyone else acting or purporting to act for him" (R. 190). Our argument is that the record sustains the decision of the District Court. Against the sworn testimony of the Board members that they followed the regulations governing them, neither speculative analyses of their unconscious motivations nor any "presumption of bias" requires a finding that they did not.

II

The Board of Immigration Appeals Exercised Its Independent Judgment and Properly Found That Accardi Did Not Merit Suspension of Deportation

It should be emphasized at the outset of our second, and major, point that this whole case arises out of the Attorney General's own regulations governing decisions by the Board of Immigration Appeals.[5] The respondent has not suggested, nor could he, that, apart from the regulations, he

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[5] This Court's prior decision, *Accardi* v. *Shaughnessy*, *supra*, left no doubt that it was the regulations which gave Accardi the right he alleged had been violated. The Court stated that these regulations "prescribe the procedure" in question (347 U.S. at 265); that, under the regulations, "the Board was required, as it still is, to exercise its own judgment when considering appeals" (*id.* at 266); that what was alleged was a violation of "that due process required by the regulations in such proceedings" (*id.* at 268); and that *"as long as the regulations remain operative,* the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner" (*id.* at 267, emphasis added).

would be entitled to any procedural rights governing the Attorney General's exercise of discretionary power to suspend deportation. The question, then, is simply stated as being whether the Board ignored the regulations under which it proceeds.

It is clear that the regulations were at no pertinent time expressly suspended or waived by the Attorney General. And so the problem is to determine whether the Board viewed the Attorney General's program as a hint, or as pressure, to ignore the regulations in cases falling within the program. This is, as Judge Frank recognized (R. 201), a question of fact. It is to be weighed, of course, in the light of judgments based on human experience and in the context of the legal traditions governing our trials of issues of fact. It is pertinent, to be sure, that officials are sensitive to the wishes of their superiors. It is not less pertinent that officials are presumed to, and characteristically do, obey the laws and the regulations under which they act. In the center of the setting provided by such generalities is the concrete testimony in this case.

A. *The Evidence Adduced at the District Court Hearing Did Not Prove, but Affirmatively Disproved, the Allegation of Prejudgment*

1. All five members of the Board of Immigration Appeals testified in this case, the Chairman orally and the other four members by deposition. All asserted firmly and unequivocally that their decision against suspension of deportation was based

solely on Accardi's record, wholly uninfluenced by any knowledge that his name was among those in the Attorney General's program (R. 71-72, 114, 125, 126). All regarded the program as affecting the Department's prosecuting activities, not as a directive or suggestion as to how the merits of any case should be adjudicated (R. 68, 70, 105, 111).[6] They had never received any communication from anyone in the Government indicating that a case should be decided adversely to the alien, nor did they understand any press release, announcement, or notification that an alien was within the program as being an indirect intimation or hint to that effect (R. 71-72, 106, 126). Under questioning by the trial judge, the Chairman of the Board testified as follows (R. 114):

> The Court: At any time during the conference in which this matter was to be considered was any order or direction or press release of the Attorney General before you?
>
> The Witness: No, your Honor.
>
> The Court: Was there any discussion among you or any other members of the Board of the import or effect of any press release or direction by the Attorney General?
>
> The Witness: No, your Honer, there was not.
>
> The Court: Was the decision you arrived at a free and undictated decision of each member of the Board?

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[6] As the District Court found (R. 189), the Board was not among the agencies of the Department of Justice concerned with administering the Attorney General's program.

The Witness: It was, your Honor.

The Court: Was there unanimity among you or was there some dissent?

The Witness: There was no dissent.

Far from having reason to regard the Attorney General's deportation program as a directive or suggestion to the Board, the Chairman first became aware of the program upon its public announcement in the press (R. 104). Later, an arrangement was inaugurated (*supra*, p. 8) under which the clerk of the Board was notified of the inclusion of any particular alien within the program. The sole understanding as to this notification was that the particular case was to be expedited (R. 108); the notification was in no sense considered as relating to the merits (R. 83). The members other than the Chairman were not familiar with the mechanics of notice to the Board concerning program cases. Two had no knowledge of the existence of the practice, and none knew when it had begun. (R. 63.) As we have noted (*supra*, p. 10), the Board members could not recall whether they knew at the time of their decision of Accardi's inclusion in the program, but all were clear that this would not in any event have been regarded by them as intended to influence their judgment and that they would have reached an independent conclusion on the merits as in any other case.

The testimony of former Attorney General McGranery, who had instituted the program, and of Michael J. Horan, assistant to the co-ordinator of

the program, demonstrated further that the Board was neither instructed, pressured, nor intended to be influenced by the drive to expedite prosecution of deportation proceedings against aliens believed to be peculiarly undesirable. Mr. McGranery testified that he had never spoken to any member of the Board regarding such cases, that he had never indicated to the Board either directly or indirectly how they should determine any case (R.142-143).[7] Mr. Horan described the program as being designed for expedition of the proceedings, and stated that neither he nor anyone else to his knowledge had ever suggested to the Board how any case should be decided (R. 75, 83).

The various press releases and public announcements pertaining to the institution and subsequent actions under the Attorney General's program—all of which were before the Court a year ago and are again in the record (R. 148-159)—were entirely consistent with this testimony. The statements throughout refer to vigor in prosecution, but affirmatively indicate at the same time that each case was to be heard in the customary manner. Thus, there are references in these materials to the institution of "appropriate" action, to the holding of aliens "for hearing," to the contemplated

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[7] The present Attorney General's Order, issued following this Court's earlier decision in this case, reflected the same continuing understanding. The Order, quoted more fully in fn. 2, pp. 13-14, *supra*, pointed out that the program concerned "those charged with prosecuting duties" and was not intended to alter the duty of independent judgment imposed by the regulations on those exercising adjudicating responsibilities.

consequences which were to follow "if" proposed charges were proved, to the recognition of a need for a "fair hearing." These declarations were not only consistent with but affirmatively demonstrated the fact that the institution of proceedings was in no case intended to deprive the alien of a fair hearing or of fair consideration of pleas for clemency.

In short, the testimony, summarized more fully in the Statement (pp. 6-10, *supra*), fairly refuted the claim that the Board or anyone else with responsibility for adjudication had been subjected to influence of any kind in deciding this case or others under the program. Not a shred of testimony pointed the other way. The dramatic offer to prove that the Commissioner of Immigration had told Accardi's former counsel that the program precluded favorable action of any kind in this case was not fulfilled or even mentioned. *Supra*, pp. 3, 10). Beyond the facts that there was a program and that the Board knew of it, respondent's case rested on the bald assertion that the Board members could not be believed when they swore that they had duly exercised their judgment on the merits of his case.

2. Analysis of the Board's actual decision in this case buttresses the testimony that the Board duly exercised the independent judgment the regulations require in such proceedings. While this Court is not the place to decide the merits of an application for suspension of deportation (see 347 U. S. at 268), it is certainly relevant that respond-

ent made out an exceedingly poor case for executive clemency. The record showed that respondent had entered the United States without a visa in 1932 (R. 177-178); that he was convicted of conspiracy to defraud the United States over a period between 1934 and 1937 (R. 178); and that he had been arrested and indicted for several offenses (R. 179-183). There was a striking discrepancy between his claiming his father as a dependent for tax purposes and the father's conveyance of $50,700 to a daughter-in-law in 1943 and 1944 (R. 173, 183-184). There was a pervasive obscurity about the source of petitioner's assets and an unwillingness or inability to explain his financial affairs satisfactorily (R. 175, 179-180, 183). Efforts to deport him began in 1947, and the dependents upon whom he relies for suspension were not acquired until 1949 (wife) and 1951 (child) (R. 173, 178-179).

Upon the foregoing facts, a hearing officer and the Acting Assistant Commissioner had denied suspension long before the institution of the Attorney General's program (R. 177, 180). The Board reached the same conclusion, solely upon "the facts and circumstances in the case" (R. 184). It made no reference to matters outside the record—which, the Chairman testified (R. 127), is done where such matters are considered.[8] Its de-

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[8] See *United States ex rel. Matranga* v. *Mackey*, 115 F. Supp. 45 (S.D. N.Y.), affirmed, 210 F. 2d 160 (C.A. 2), certiorari denied, 347 U.S. 967; *Alexiou* v. *McGrath*, 101 F. Supp. 421 (D. D.C.).

cision is, we submit, amply justified and explained by the record. As the District Court found (R. 190), "The Board's adverse decision on Accardi's appeal is adequately supported by the evidence before the Board."

It is true, as Judge Frank observed (R. 203), that the Board's decision noted that affidavits, testimony of character witnesses, and investigation showed that Accardi was "considered" a person of good moral character (R. 183-184). Judge Frank went on to point out (R. 204) that a Department of Justice press release following the Board's decision described Accardi as a "racketeer." But it is impossible to see how this juxtaposition does anything but help to demonstrate the separateness of the Board's proceedings from the Attorney General's program and the publicity attending it. Surely, had the Board felt itself consciously or unconsciously influenced by the program, its decision would have conformed more closely to the Department's subsequent press release. Insofar as the Board's decision reflects the weighing of pros and cons, insofar as it displays a need for judgment and a process of judgment, insofar as it is less than a ringing denunciation of respondent as a scoundrel, it evidences what the Board members later swore was true—that they exercised their own discretion, as the regulations required.

Other circumstances of the Board's decision point to the same conclusion. The case was heard by the Board on November 26, 1952 (R. 181). The Board's decision was rendered on April 3, 1953

(ibid.), in what the Chairman described as "about normal routine time" (R. 118). So this particular case was not even accorded the priority assigned to other cases under the program as a matter of the Board's administrative routine (R. 117). In every respect, it appears on its face to be the customary, independent kind of judgment its authors claimed it was.

Other cases of aliens under the program add further support to this view. As we noted when this case was here before (Resp. Br. 35-36, No. 366, O. T. 1953), action favorable to the alien had been taken in several cases of this kind. Judge Frank observed (R. 205) that this argument was unpersuasive to this Court, and we acknowledge our failure to show that there was no need for a hearing on the petition for habeas corpus. But the case is in a different posture now. There has been a hearing. The testimony is all one way—against the allegation of prejudgment. The problem remaining is whether generalizations of one kind or another require rejection of this testimony or sustain the finding of the District Court that the sworn statements of the Board members reflected the true facts. For the resolution of this problem, it seems apposite that not only this case but others in the same category bear evidence that the Board has followed the usual procedures under the regulations in reaching its independent determinations, and that there have been several decisions favorable to "program" aliens.

3. From the evidence before it, the District Court made the following findings (R. 190):

> 6. The Attorney General never discussed his program with the Chairman or any Board member. There is no evidence, nor is it claimed, that he ever discussed this relator's or any other case with any of them.
>
> 7. The Board members and each of them who considered Accardi's appeal reached their individual and collective decision on the merits, free from any dictation or suggestion by the Attorney General or any of his assistants or anyone else acting or purporting to act for him.
>
> 8. The Board's adverse decision on Accardi's appeal is adequately supported by the evidence before the Board.

This Court has had the advantage of seeing and hearing the Board's chairman on the stand and accepts completely his testimony which was neither shaken nor controverted. The testimony of the other witnesses was introduced through their depositions, all of which have been carefully read. It is significant that none of this testimony is in any respect contradicted or shaken. Relator's position here reduces to the mere suggestion that the Court should disbelieve the witnesses' denials and accept the inferences relator draws from the existence of the Attorney General's program

and the practice of notification. I find no rational basis for disbelieving the witnesses, and relator's inferences are clearly refuted by the testimony which is fully accepted.

These findings are sustained by the uncontradicted testimony in the record. Unless that testimony is inherently incredible, there is no ground for rejection of the findings as "clearly erroneous." In the discussion which follows we urge that the overriding premises on which the trial court's findings were reversed are untenable.

B. *The Testimony of the Board Members, Found Credible by the Fact-Finding Judge, Should Not Have Been Rejected on the Basis of a "Presumption of Bias" or Questionable Psychological Assumptions.*

The five Board members who testified firmly and certainly that their decision in this case was their own are seasoned and responsible officers. Each has served for many years, under successive Attorneys General, in a judicial capacity the importance and seriousness of which require no elaboration here. Chairman Finucane, who served on the Labor Department's Board of Review when immigration matters were handled there, has been a member of the Board of Immigration Appeals since its creation in 1940 and Chairman since July of 1942. Member Nettleton, who was also on Labor's Board of Review (from 1933 to 1940), has been a member of the present Board since August 1942. Members

Charles, Ludwig, and Wilson have served, respectively, since October 1940, July 1946, and July 1948.

We suggest that the sworn testimony of officers with such backgrounds carries considerable weight when they declare, as each of these did, that their decision in this case, as in others, was uninfluenced by the Attorney General's program. These are not casual, *ad hoc* adjudicators. They are persons for whom judging has been the daily business of long years—sensitive to subtle pressures as well as blunt forces affecting the decisional process. So it is significant that not one word of their testimony, but only speculation, supports the conclusion that their decision in respondent's case was influenced or prejudged by the Attorney General.

The long experience of these Board members is significant, too, in the assurance it adds to the usual presumption of official regularity. Fixed habits of proceeding in accordance with controlling regulations are not dissipated by supposed hints in the newspapers while the regulations remain untouched by the authority who promulgated them. This point is of peculiar interest here, where, as we have observed, respondent's case rests at once on a right he claims from the regulations and on a presumption that the Board must have violated the regulations.

Against these briefly sketched considerations fortifying the testimony and the findings the District Court predicated upon it, Judge Clark's concurring opinion adduced a "presumption of bias" from the facts "that there was a list as alleged, that [re-

spondent] was on it, and that this fact was known to the Board" (R. 214). Insofar as this conclusion is thought to follow as matter of law from this Court's mandate, we believe it to be an erroneous construction of the Court's opinion—for the reasons stated in Point I, *supra*. If Judge Clark meant, however, that the admitted facts lead inevitably to a commonsense inference of bias, that "factual" conclusion is subject to infirmities even more severe than Judge Frank's fuller analysis. The kind of specific and detailed evidence the record now contains cannot be dispensed with on a vague and unsupported "presumption" that the Board, knowing of the program, must inevitably have departed from the regulations calling for exercise of its discretion.

We turn to an examination of Judge Frank's opinion, which, in essence, finds that the testimony and the findings based thereon are, according to his views of human nature, inherently incredible. He said (R. 201):

> * * * We accept it as a fact that the Board members *consciously* believed, when they testified, that the Attorney General's statements amounted to no more than a calendar order (i.e., a direction to give preference, merely in point of time, to consideration and decision of such cases), and that, beyond that, those statements did not have any effect on the Board's decisions. But it is incredible, human nature being what it normally is, that the At-

> torney General's statements—as interpreted by the Supreme Court and the former Attorney General—did not *unconsciously* influence the Board members so that they felt obliged not to exercise their discretion and, without doing so, to decide against Accardi. Any other finding involves reliance on so remarkable a degree of improbability as to be untenable.

Judge Frank says in effect that no normal human being, faced with the knowledge that his superior had instituted proceedings against a particular alien as undesirable, could possibly have decided, no matter what the evidence, that the alien was not in fact undesirable. On this view of human nature, no government or fairly large business could operate. Administrators in every phase of government and business must rely upon subordinates to inform them that a tentatively expressed opinion has been found to be based on insufficient facts or is otherwise erroneous. If mere expression of opinion by a person in authority were, without more, to create an irrebuttable presumption that those called upon to judge would act in subservience to the supposed wishes of higher authority, then no decision of any judge, short of the Supreme Court, could stand if it were in accord with the announced interests of anyone high in the executive hierarchy, lest the judge have in mind that his advancement to a higher bench depends on executive appointment. Moreover, the thousands of administrative

decisions would become targets for speculative claims of subservient bias.

We do not by any means suggest that the views of Judge Frank are totally unfounded in human experience or that subordinates *never* give advice that flatters by its agreement with the superior's preconceptions rather than guiding by an honest independent judgment. What we oppose is the view that infinitely variable "human nature" operates this way always or so commonly that sworn testimony to the contrary in a given case is "incredible." It is an everyday fact, around which life revolves, that the world is at least partly populated with people who have the stamina and drive, both on the conscious and unconscious level, to make their own decisions freely and to rejoice in that liberty.

More particularly, we deny the validity of Judge Frank's generalization in its application to this case. The regulations governing the Board's deliberations remained unaltered, demanding at all times the benefit of the Board's independent judgment to aid the discretion ultimately confided by Congress in the Attorney General. The Board swears it acted in accordance with the regulations. The whole gamut of experience shows that the assertion cannot be deemed "incredible"—incapable of belief—at all.

It is no more incredible or impossible than the impartiality routinely expected in a whole host of situations where judicial or executive officers

make final decisions following initial actions which could superficially be labelled "prejudgment." It is elementary, for example, that a judge who has found it necessary to be severe in rulings throughout a trial, and perhaps in comment on the evidence, is not thereby disqualified for the discretionary decision as to the extent of the sentence. In the executive area, one seeking a pardon can scarcely contend that his request must be assumed to have been ignored because the executive headed the organization which obtained the sentence and may have enunciated a determination vigorously to prosecute the particular crime. Similarly, the fact that a hearing is "before the same authority which has preferred the charges" does not justify an assumption "in advance that an administrative hearing may not be fairly conducted." *Fahey* v. *Mallonee,* 332 U.S. 245, 256. And an expression of opinion as to the general illegality of a practice does not disqualify a board from deciding a particular case involving such practice. *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 700-703. In all such cases, the normal expectation is that those charged with the responsibility of office will act honestly and lawfully. That expectation—the so-called "presumption of regularity" —was held insufficient by this Court to preclude the possibility that the Board members in this case had in fact failed to exercise their discretion. Now, however, in view of their sworn testimony that they behaved properly, the presumption

should certainly be as weighty on the side of believing them as the supposition that they were "unconsciously" impelled to ignore their duty.

The view of human nature expressed by Judge Frank is one which this Court has consistently rejected as a basis for decision, and the uncharted area of the effect of subconscious psychological pressures on which he relies is one in which this Court has consistently refused to roam at large. Thus, as we have noted, this Court has held that general expressions of opinion or the initial determination involved in making a decision to commence an administrative proceeding do not render a board incapable of judging fairly the particular case brought before it for adjudication. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 700-703; *Fahey* v. *Mallonee*, 332 U.S. 245, 256. It has refused to enter into the area of psychological speculation and impute, on the theory of constructive bias, a dishonest or intimidated point of view to government employee jurors. *Dennis* v. *United States*, 339 U.S. 162; *Frazier* v. *United States*, 335 U.S. 497; *United States* v. *Wood*, 299 U.S. 123. It has rejected inquiries into the psychological factors that enter into a judgment. *United States* v. *Morgan*, 313 U.S. 409, 421-422. The Court has declined to engage in psychological speculation that a jury, with less expertise than an official government board, would not be able to follow instructions given it. It recently said, in *Opper* v. *United States*, 348 U.S. 84, 95:

> To say that the jury might have been confused amounts to nothing more than *an unfounded speculation that the jurors disregarded clear instructions of the court* in arriving at their verdict. Our theory of trial relies upon the ability of a jury to follow instructions. [Emphasis added.]

The same refusal to speculate as to such imponderable psychological elements—which cannot be proved and have not shown their right to acceptance—should apply to both the Attorney General and his subordinates. When an Attorney General announces a program as one of expedition, and his subordinates testify that they consider it as such, there is no reason to assume that all parties must have considered it to be something else. When a board states that it feels free to exercise its independent judgment, an appellate court is not warranted in finding, on the basis of its own psychological theories, that there must have been unconscious pressure. Psychology is not yet such an exact science that unconscious compulsions of this type can be singled out and evaluated by an appellate court which has not even seen the witnesses, nor is there reason to believe that psychologists would make that claim. For instance, a sense of personal integrity and pride of decision can be as compelling as the desire to please a superior. It is impossible, in short, to evaluate in portmanteau fashion all the psychological factors which enter into the process

of judgment. We have not yet reached the stage of knowledge in which we can summarily assume that when responsible government officials testify that they exercised their independent judgment, they did not do just that; that when their superior testifies that he intended them to exercise their independent judgment, he did not mean what he said. In a government run by human beings, we have as yet no general dispensation to disregard the solemn word of responsible officers, whose integrity has not been impeached, that they honestly tried to judge a case before them impartially.

The impossibility of properly evaluating the speculative psychological factors on which Judge Frank bases his decision renders inapposite the array of cases which he cites. Views of human nature hardly have the fixed content of the contemporaneous documentary evidence upon which this Court reversed the findings of fact in *United States* v. *Gypsum Co.*, 333 U.S. 364. Cases where findings have been reversed for physical impossibility [9] or objective factual improbability [10] are clearly very

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[9] *E.g.*, *Smith* v. *Davis*, 34 Fed. 783, 784 (N.D. Ill.) (a claimed earlier patented device did not have the requisite number of electrodes); *The El Dorado*, 27 Fed. 762, 763 (S.D. N.Y.) (impossibility of a ship's propeller blade being in motion at the time of collision established by physical evidence of the prints made in the side of the colliding ship); *Curley* v. *Missouri Pac. Ry. Co.*, 104 Mo. 211 (claimed injuries from the bumpers of freight-cars at a certain point on thigh not possible to human stature).

[10] *E.g.*, *Quock Ting* v. *United States*, 140 U. S. 417, where a Chinese boy of 16, claiming birth and residence in the United States for the first 10 years of his life, was discredited by his lack of any knowledge of English and his failure to testify to any incident or circumstances of his life in the United States.

different from the situation presented here. Nor is this a case, like many of those cited,[11] where there is contradictory testimony outweighing an improbable claim. It is not impossible or even improbable that a group of subordinates would feel free to tell the Attorney General, in effect, that his preliminary opinion was not supported by the evidence.

Even less apposite are the cases cited by Judge Frank dealing with the possible bias of interested witnesses. In not a single one of such cases was the fact-finding tribunal reversed upon any assumption that the witness' testimony could not support a finding. The point in each case was merely that the interested witness' testimony would not outweigh the outright contradiction by other witnesses or by objective facts. Moreover, the contravening facts were of a directness not remotely approximated by the theorizing below as to what the general pronouncements of the Attorney General called for, or what inwardly motivated the members of the Board.[12] None of the cited cases

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[11] For example, in *Fire Ass'n of Philadelphia* v. *Weathered*, 54 F. 2d 779 (C.A. 5), recovery under a fire insurance policy was dependent upon the house being occupied. The claimant produced a witness who testified that he stayed in the house at the claimant's request during the 24 nights involved, sleeping on a cot and putting the cot and bedclothes away in a certain closet each morning, and using a flashlight for illumination. The testimony was specifically contradicted by testimony that there was no such closet. Moreover, a witness who had been inside the house several times, and various neighbors, testified that they had observed no sign of the alleged occupancy.

[12] A number of the cases cited involved direct financial interest. *Grant* v. *Bradstreet*, 87 Me. 583, 609; *Fisler* v. *Porch*, 10 N. J. Eq. 243, 255; *Vreeland* v. *Vreeland*, 48 N. J. Eq. 56;

supports reversal of a quasi-judicial decision on the basis of such psychological speculation as that announced in the decision below.[13]

Hunter v. *Wetsell*, 84 N. Y. 549; *Crouch* v. *Hooper*, 16 Beav. 182, 185, 51 Eng. Rep. 747.

The remaining citations as to the possible errors of witnesses embody numerous instances of an intense degree of non-financial interest on the part of witnesses, combined with definite, unarguable inconsistencies in the testimony itself or in the factual situation.

[13] Judge Frank's citations to Moore, *Facts* (R. 202, n. 4h, n. 4j, 203, n. 4k, n. 4r) fail to take account of the cautions expressed by that author. Thus, at Section 93 (1908 ed., Vol. 1, p. 139), Moore discusses "abstract improbabilities" but cautions (*id.*, pp. 139-140):

> * * * It is doubtful whether any of the courts intend by this locution to sanction the rejection of testimony abstractly improbable. It would be a monstrous proposition that an improbable fact cannot be established in a court of justice. * * *
>
> * * * It cannot be arbitrarily disregarded by either court or jury, for reasons resting wholly in their own minds, and not based upon anything appearing on the trial. * * * Facts attested by the oath of credible witnesses must stand even in the face of a clear and forcible argument, that, judging by the ordinary course of business affairs, the fact should have been different from what it is sworn to be. It has been said that "there is no limit to the eccentricities of men," and that testimony should not be disbelieved solely because it "borders on the incredible." Certainly a jury is at liberty to believe facts which witnesses testify to, even if they would be considered highly improbable without such testimony. * * *

Similarly, the citation of Section 137 is to be read with its caution (1908 ed., Vol. 1, pp. 183-184):

> * * * [A]bstract improbability does not alone justify disbelief in the positive testimony of credible witnesses, and * * * the improbability which authorizes the trier of facts to withhold belief must be found somewhere in the evidence in the very case in hand. * * *

With the quoted generality that proof must be strong in proportion to the improbability of what is proved (Moore, *Facts*,

There is ample authority, among the very cases cited by Judge Frank, which helps to demonstrate the error of reversing the District Court's findings in this case. In *United States* v. *Oregon Med. Soc.*, 343 U. S. 326, this Court refused to set aside as clearly erroneous the District Court's findings that the defendant medical societies were not monopolizing prepaid medical care. At least in the forum of psychological theory, it seemed arguable that the District Judge was unconsciously, or even consciously, motivated by views he published as notes to his decision, indicating *inter alia* (1) that antitrust prosecutions were in general dubious as expressions of "the economic and social views of those in power" at any given time; (2) that the case was "an attack on the professions," reflecting a doctrine of "World Revolution" which "allows no place for the professions"; (3) that the defendants were really only defending against the threat of "socialized medicine"; and (4) that the next step, if the threat was not stoutly met here, would be "socialized law." See 95 F. Supp. at 107 *et seq.* Characterizing these as "irrelevant soliloquies," this Court rejected the suggestion of bias the Government predicated upon them (343 U. S. at 338), and concluded (p. 339):

1908 ed., § 32) we have no quarrel, but we find nothing in the quoted section or its examples to indicate that the type of improbability there referred to is to be found in an assumption that a board nominated by an Attorney General is not to be believed in its uncontradicted and clear statement of its interpretation of a press release and notification by the Attorney General, and in its claim of conduct in accord with its duty.

> * * * [T]he record does not leave us with any "definite and firm conviction that a mistake has been committed."
>
> As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: "Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth. * * * How can we say the judge is wrong? We never saw the witnesses. * * * To the sophistication and sagacity of the trial judge the law confides the duty of appraisal." *Boyd* v. *Boyd*, 252 N. Y. 422, 429, 169 N. E. 632, 634. [14]

Again, only recently, in *McAllister* v. *United States*, 348 U. S. 19, the Court reversed the Court of Appeals for the Second Circuit for overriding a District Court finding which was surely within an area of high debatability. In that case, the District Court had found negligence in certain conduct aboard a vessel asserted to have led to plaintiff's contraction of polio. This Court reinstated the District Court's finding despite the obvious impossibility of any absolute determination of the cause of the disease, stating (p. 22) that upon the "bal-

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[14] It bears emphasis that in this case the Chairman, the best informed member of the Board, testified in person and was extensively interrogated by the trial judge.

ance of the probabilities" the District Court's inference was a reasonable one.

We recognize, of course, that precedents on factual determinations serve to chart a general course, rather than to diagram the result in a particular case. We believe, however, that the generalities invoked below as a basis for reversing the District Court exceed the scope of proper appellate review and are, even as a factual matter, highly questionable in themselves. Contrary to the court below, we submit that there is nothing in the pronouncements of the former Attorney General which renders improbable his testimony (confirmed by the present Attorney General, see fn. 2, *supra*, pp. 13-14) that he intended the program as one of expedition in prosecution and not as a directive or hint to those charged with responsibilities for adjudication. There is nothing inherently "incredible" in the testimony of the Board members that they so interpreted the program and that they exercised their own discretion in each program case that came before them. Even if, as this Court has hitherto declined to do, a court may profitably engage in speculative appraisals of the type considered by Judge Frank in probing the mental process of adjudication, such reflections hardly warrant sweeping into the discard the testimony of the Board members in this case that they exercised their independent judgment and decided on the record before them. The District Judge, who heard and questioned the Chairman of the Board, and weighed the other testimony in the record, gave every evidence that he

was bringing to bear the wisdom and knowledge which is automatically assumed, until disproved, in all such deliberations. He found the testimony wholly credible. The appellate judge was not justified in overruling that finding.[15]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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MARCH 1955.

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[15] If, as we believe, Judge Clark's opinion rests solely on his interpretation of this Court's prior opinion (see *supra*, pp. 13-14, 24, 37-38), Judge Frank alone overruled the trial judge's findings. Judge Harlan, on the other hand, upheld those findings.

APPENDIX

Section 19(c) of the Immigration Act of 1917, as amended, 8 U. S. C. (Supp. V, 1946 ed.) 155(c), provided in pertinent part:

> In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on

the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the session at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. * * * Upon the cancellation of such proceedings in any case in which fee has been paid the Commissioner shall record the alien's admission for permanent residence as of the date of his last entry into the United States and the Secretary of State shall, if the alien was a quota immigrant at the time of entry and was not charged to the appropriate quota, reduce by one the immigration quota of the country of the alien's nationality as defined in section 12 of the Act of May 26, 1924 (U. S. C., title 8, sec. 212) for the fiscal year then current at the time of cancellation or the next following year in which a quota is available: *Provided*, That no quota shall be reduced by more than 50 per centum in any fiscal year.

8 C. F. R. (1951 Supp.) 150 provided in pertinent part:

§ 150.7 *Application, prior to hearing, for suspension of deportation*—(a) *Who may apply.* Any alien against whom warrant proceedings have been instituted who believes himself entitled to suspension of deportation may apply therefor prior to hearing * * *.

§ 150.9 *Evidence; burden of proof.* All evidence adduced during this special procedure may be used in any other proceeding and the alien shall be duly informed of this fact. The burden of proof shall be upon the applicant. In presenting his proof he shall be entitled to the benefit of any disclosable records concerning him which are in the custody of the Service.

8 C. F. R. (1951 Supp.) 151 provided in pertinent part:

§ 151.3 *Contents of record; evidence.* * * *

* * * * *

(e) *Application for discretionary relief.* At any time during the hearing under the warrant of arrest the alien may apply for suspension of deportation, or for the privilege of departing from the United States at his own expense in lieu of deportation, or for the privilege of departing from the United States at his own expense in lieu of deportation with the additional privilege of preexamination. He may

apply in the alternative for more than one of these three forms of relief. The burden of establishing that the alien meets the statutory requirements precedent to the exercise of discretionary relief shall be upon the alien. In addition, he may submit any written or oral material which he believes should be considered in the exercise of discretion by the Commissioner.

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